**MOHD ZAID IBRAHIM** A

**v.**

**P KAMALANATHAN P PANCHANATHAN & ORS**

HIGH COURT MALAYA, SHAH ALAM B
AZAHAR MOHAMED J
[ELECTION PETITION NO: PP-1-2010]
5 AUGUST 2010

***CIVIL PROCEDURE:*** *Jurisdiction - Court - Election court - Jurisdiction of election court - Whether election judge empowered to strike out defective petition without trial* C

***ELECTION:*** *Election court - Judge - Jurisdiction - Whether election judge empowered to strike out defective petition without trial* D

***ELECTION:*** *Petition - Allegation of corrupt practice - Bribery - Pleadings - Failure to mention names of persons induced by corrupt practices - Failure to plead essential element constituting offences of bribery within meaning of s. 10(a), (c) & (e) Election Offences Act 1954 - Failure to plead sufficient facts and grounds - Fundamental flaw - Petition defective and invalid - Election Petition Rules 1954, r. 4 - Election Offences Act 1954, s. 32 (a) & (c)* E

***ELECTION:*** *Petition - Application to strike out election petition - Allegations of corrupt practices - Failure to mention names of persons induced by corrupt practices - Failure to plead essential element constituting offences of bribery within meaning of s. 10(a), (c) & (e) Election Offences Act 1954 - Failure to plead sufficient facts and grounds - Fundamental flaw - Petition defective and invalid - Election Petition Rules 1954, r. 4 - Election Offences Act 1954, s. 32 (a) & (c)* F G

***ELECTION:*** *Petition - Appointment of advocate - Whether complied with r. 9 Election Petition Rules 1954 - Whether notice of appointment of advocate must be stamped - Whether failure to stamp is a ground to strike out petition* H

***ELECTION:*** *Petition - Service - Whether petition may be served through more than one mode of service - Election Petition Rules 1954, r. 15*

This election petition arose as a result of a by-election for the parliamentary constituency of P94 Hulu Selangor. The petitioner I was the candidate at the by-election for Parti Keadilan Rakyat whereas the 1st respondent was the candidate for Barisan National.

A The 1st respondent was subsequently declared the winner. The petitioner filed this petition pursuant to s. 34(b) of the Election Offences Act 1954 (the Act), praying, *inter alia* for a determination that the said election was null and void on the following grounds: (a) Corrupt practice by the 1st respondent and/or the agent B pursuant to s. 32(c) of the Act; and (b) General bribery by the 1st respondent and/or the agent pursuant to s. 32(a) of the Act. Three main corrupt practices were alleged to have been committed by the 1st respondent under s. 10(a), (c) and (e) of the Act. The 1st respondent applied to strike out the petition on the following C grounds: (a) the petitioner's failure to comply with r. 15(1) of the Election Petition Rules 1954 (EPR). It was claimed that the "Notis Penyampaian Petisyen Pilihanraya" under r. 15(1)(a) was defective in that it stated that the said Notice was also posted on the notice board of the High Court by way of service on the 1st respondent; D (b) the petitioner's failure to comply with r. 9 of the EPR. It was claimed that the notice of appointment of advocate was not stamped as required under r. 9; (c) the petitioner's failure to comply with r. 4(1)(b) and r. 4(4) (3) of the EPR. It was claimed that the petition did not contain the material facts as required by rr. 4(1)(b) E and 4(4) (3) in that the petitioner has failed to name the persons to whom the alleged corrupt acts were made or addressed; (d) the matters pleaded in the petition not falling within the definition of s. 32 (a) and/or (c) of the Act. It was claimed that the petitioner failed to plead how the purported "general bribery" had affected the F result of the by-election; and (e) the petition not disclosing any reasonable cause of action. The 2nd and 3rd respondents raised the following preliminary objections: (a) that the petition did not disclose any reasonable cause of action against them; and (b) that the petitioner failed to comply with r. 4(1)(b) EPR as the G particulars pleaded did not amount to any of the offences under s. 32(a) and/or (c) the Act. The petitioner on the other hand raised a preliminary issue on whether an Election Judge is vested with the power to dispose of an election petition by way of a striking-out application or a preliminary objection.

H

**Held:**

**(1)** An Election Court is vested with the power to strike out or otherwise dispose of an election petition by way of a striking out application or a preliminary objection. (para 14)

I

**(2)** The EPR is not entirely clear as to whether the service must be done by one mode of service only. The petitioner was therefore entitled to use one or more modes provided under the EPR to effect service on the 1st respondent. The petition and the r. 15(1)(a) Notice were served on the respondents pursuant to r. 15(1)(a) EPR. The service has fully complied with r. 15(1) of the EPR. (paras 21 & 22)

**(3)** The Stamp Act 1949 does not contain any provision for the stamping of documents of this nature. In any event, even if the said notice is not stamped, it merely went to the issue of admissibility of the notice and did not form a ground to strike out the petition. (para 28)

**(4)** To sustain an election petition under s. 32 (a) and (c) of the Act, the material facts to be pleaded as required by r. 4 of EPR would be the elements that constitute the offence of bribery in question. The 1st respondent is entitled to know with clearness and certainty at the very earliest stage the name and identity of the persons to whom the alleged act was made or addressed. (paras 35 & 37)

**(5)** There was a glaring omission in the petition to mention the names of the persons said to have been so induced or influenced by the alleged act of the 1st respondent or his agent. None of the recipients of any such alleged bribe were named in the petition. (para 40)

**(6)** The fundamental flaw in the petition was a matter of substance and not merely form. This was not a mere technical non-compliance. The petition was lacking in the most vital and material essential fact to furnish a cause of action. The petitioner failed to plead the essential element that constituted the offences of bribery within the meaning of s. 10(a), (c) and (e) of the Act. Consequently, the petitioner had not complied with the requirements of r. 4(1)(b) and r. (4)(3) of the Act as the facts pleaded were insufficient to sustain the prayer. It rendered the petition defective and invalid. (paras 41 & 42)

**(7)** No sufficient particulars were furnished in the petition to explain that the alleged extensive prevalence of general bribery was more probable than not have affected the result of the by election. Hence, the petitioner failed to comply with the

provisions of s. 32(a) of the Act read with r. 4(1)(b) and 4(4)(3) of the EPR for the purpose of enabling the petition to go to trial. (para 49)

**(8)** In accordance with s. 36(1) of the Act, the 1st respondent was declared duly elected as the Member of Parliament for Hulu Selangor Parliamentary Constituency of P94. (para 51)

**Case(s) referred to:**

*Ahmad Jamaluddin Abd Majid v. Rafidah Aziz & Ors [2009] 2 CLJ 785 FC* ***(refd)***

*Azhar Hussain v. Rajiv Gandhi AIR [1986] SC 1253* ***(refd)***

*Chiew Chiu Sing v. Dato Seri Tiong King Sing [2004] 8 CLJ 82 HC* ***(refd)***

*Dr Shafie Abu Bakar v. Pegawai Pengurus Pilihanraya N26 Bangi & Ors [2005] 5 CLJ 349* ***(refd)***

*Gan Joon Zin v. Fong Kui Lin & Anor [2004] 4 CLJ 729 FC* ***(refd)***

*Kesha Prasad v. AD Mani [1961] DEC 133 (MPHC)* ***(refd)***

*Kho Whai Phiaw v. Chong Chieng Jen [2009] 3 CLJ 201 HC* ***(refd)***

*KK Ramachandran Master v. MV Sreyamakumar & Ors [2010] STPL (Web) 444 SC* ***(refd)***

*Mahari Endut v. Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors [2009] 4 CLJ 488 FC* ***(refd)***

*Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors [2009] 3 CLJ 221 FC* ***(refd)***

*Mohd Ridza Zain v. Hanafi Mamat & Ors [2006] 1 LNS 194* ***(refd)***

*Re Pengkalan Kota Bye-Election Teoh Teik Huat v. Lim Kean Siew and Anor [1981] 1 LNS 1* ***(refd)***

*Ruhimin Adzim @ Ruhimin Ajim v. Bernard Dompok & Anor [2004] 1 LNS 461 HC* ***(refd)***

*Wan Daud Wan Jusoh v. Mohamed Hj Ali & Ors [1988] 2 MLJ 384* ***(refd)***

*Wan Sagar Wan Embong v. Harun Taib [2008] 5 CLJ 14 FC* ***(refd)***

*Wan Sagar Wan Embong v. Harun Taib (No 2) [2009] 1 CLJ 457* ***(refd)***

*Zulkarnaini Mohamed Noor v. Syed Omar Mohamed & Anor [1978] 1 LNS 245* ***(refd)***

**Legislation referred to:**

Election Offences Act 1954, ss. 9, 10(a), (c), (e), 15(1), 32(a), (c), 34(b), 35A, 36(1), (2), 37

Election Petition Rules 1954, rr. 4(1)(b), (4)(3), 5, 9, 15(1)(a), (c)

Federal Constitution, arts. 113, 118, 121

**Other source(s) referred to:**

*Janab's Key to Criminal Procedure Evidence Advocacy And Professional Ethics*, 1st edn 2001, p 75

Professor MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edn, p 291

*For the petitioner - Malik Imtiaz (Azhar Azizan Harun, Ang Hean Leng & Leong Sher How with him); M/s Thomas Philip*
*For the 1st respondent - Firoz Hussein (Dato' Mohd Hafarizam, Cheng Mai, Syed Faizal, Abu Bakar Sidiq & Nadhrah with him); M/s Hafarizam Wan & Aisha Mubarak*
*For the 2nd & 3rd respondents - Suzana Atan (Azizan, Mohd Azhar Mohd Yusoff & Noor Hisham Ismail with her) SFC*

*Reported by Amutha Suppayah*

## JUDGMENT

**Azahar Mohamed J:**

**The P94 By-election**

**[1]** This election petition arises as a result of a by-election which took place about three months ago. Mohd Zaid bin Ibrahim (the petitioner) was the candidate at the by-election for the parliamentary constituency of P94 Hulu Selangor for Parti Keadilan Rakyat. In the said by-election held on 25 April 2010, the petitioner and one P Kamalanathan a/l P Panchanathan (the 1st respondent), representing the Barisan National, were the only candidates. A total number of 64,500 parliamentary electors made up the electorate of the parliamentary constituency of P94 Hulu Selangor at the material time for the said by-election. The said parliamentary constituency covered the area of Hulu Selangor which included the districts of Rasa, Sungai Buaya and Kalumpang. The 1st respondent was subsequently declared the winner with a majority of 1,725 votes. The Returning Officer, Tuan Hj Nor Hisham bin Ahmad Dahlan (the 2nd respondent), returned the 1st respondent as being duly elected as Member of Parliament of P94 Hulu Selangor.

**The Election Petition**

**[2]** Subsequently, on 24 May 2010 the petitioner filed the petition herein pursuant to s. 34(b) the Election Offences Act 1954 (the Act), praying the following:

a) that it might be determined that P Kamalanatman a/l P Panchanathan, the respondent herein, was not duly elected or ought not to have been returned as the Member of Parliament for P94 Hulu Selangor parliamentary constituency and this his said election was null and void;

A b) for determination and directions under s. 36 of the Act;

c) costs; and

d) any such further order or other reliefs as the court deems just.

B **[3]** Besides the 1st and 2nd respondents, the Election Commission Malaysia, the constitutional body which conducted the by-election pursuant to art. 113 of the Federal Constitution (FC) was also named as the 3rd respondent.

C **[4]** Section 32 of the Act specifies five grounds on or under which an election may be declared void by an election petition. It is worth noticing at the outset that the petitioner filed the petition on the following two grounds:

D a. Corrupt practice by the 1st respondent and/or the agent pursuant to s. 32(c) of the Act; and

b. General bribery by the 1st respondent and/or the agent pursuant to s. 32(a) of the Act.

E **[5]** As it can be understood from the election petition, three main corrupt practices were alleged to have been committed by the 1st respondent. The first falling under s. 10(a) of the Act. The second falling under s. 10(c) and the third falling under s. 10(e).

F **[6]** Continuing with the sequence of events, counsels for the respective parties appeared before me on 16 June 2010 for pre-trial case management. This court then fixed 19 July 2010 until 29 July 2010 for the trial of the petition.

**The 1st Respondent's Striking Out Motion**

G **[7]** The 1st respondent then took out a motion dated 28 June 2010 (encl. 26) seeking to strike out the petitioner's petition. On 9 July 2010, the 2nd and 3rd respondents gave notice of their preliminary objection.

H **[8]** The 1st respondent's motion to strike out the petition is premised on the following grounds:

(a) the petitioner's failure to comply with r. 15(1) of the Election Petition Rules 1954 (EPR);

I (b) the petitioner's failure to comply with r. 9 of the EPR;

(c) the petitioner's failure to comply with r. 4(1)(b) and r. 4(4) of the EPR;

(d) the matters pleaded in the election petition not falling within the definition of s. 32(a) and/or (c) of the Act; and/or

(e) the election petition not disclosing any reasonable cause of action.

**The 2nd And 3rd Respondents' Preliminary Objection**

**[9]** The 2nd and 3rd respondents' preliminary objection is based on the following:

1. The election petition does not disclose any reasonable cause of action against the 2nd and 3rd respondents; and

2. The petitioner has failed to comply with the mandatory requirements under r. 4(1)(b) EPR because the petition does not contain sufficient facts and/or the facts or particulars pleaded do not amount to any of the offences provided under s. 32(a) and/or (c) the Act as follows:

   (a) The petitioner has failed to identify the purported persons to whom the promises were alleged to have been made and/or has failed to state whether they were registered voters of the Parliamentary Constituency of P94 Hulu Selangor.

   (b) The petitioner has failed to state the facts and grounds relied upon to sustain the prayers sought for that are how the alleged general bribery has so extensively prevailed that it is reasonably supposed to have affected the result of the election as provided under s. 32(a) of the Act.

   (c) The issues pleaded by the petitioners do not in law constitute bribery as defined under s. 10(a) and/or (e) of the Act and therefore do not amount to "corrupt practice" as provided for under s. 32(c) of the Act.

**[10]** In view of the striking out motion and the preliminary objection, I will have to deal with and resolve these interlocutory applications in the first instance.

A **Petitioner's Preliminary Issue**

**[11]** Before dealing with the specific issues which arise for decision in relation to the interlocutory applications, there was one preliminary issue raised by the petitioner. It is this. Whether an B election judge is vested with the power to strike-out or otherwise dispose of an election petition by way of a striking-out application or a preliminary objection?

**[12]** Mr. Azhar Azizan Harun, learned counsel for the petitioner argued that an election judge is not vested with such a power. His C argument can be summarized as follows. Under art. 118 of the FC, an election may only be called in question by an election petition presented to the High Court having jurisdiction where the election was held. This is the Constitutional provision which creates the jurisdiction of the High Court to adjudicate an election petition. D This is in contrast with the High Court's general jurisdiction and powers. In this respect, art. 121 of the FC provides that such jurisdiction and powers may be conferred by federal law. Thus, the general jurisdiction and powers of the High Court derives mainly from the provisions of Part 11 of the Court of Judicature Act 1964. E The Act postulates a disposal of election petition only by way of a trial and nothing else and upon the conclusion of a trial; the election judge has specific duties to perform as follows: Section 35A – trial of petition shall be completed in six months; s. 36(1) – F determinations which shall be made by the election judge at the conclusion of trial; s. 36(2) – duty to certify his determination; and s. 37 – duty to make report in writing whether there was any corrupt or illegal practice upon conclusion of a trial.

**[13]** These duties are specific and are imposed upon the election G judge mandatorily by the Act. An election judge is, therefore, constraint by the duties and functions which the Act imposes upon him. He is constraint by the powers which are expressly vested in him by the Act and nothing else. The saving provision in s. 42 of the Act only concerns the procedure and practice which are to be H adopted. With express requirement under the Act for an election judge to make determination, certification and report upon the conclusion of the trial of an election petition, there is no question of an election judge having the power to strike out an election petition in the manner in which the respondents are asking in their I respective applications. The procedures and practice of the High

Court cannot be adopted when there is no power to exercise in the first place. That in a summary is the submission of counsel for the petitioner.

**[14]** Now, I had on 20 July 2010 disallowed the preliminary issue raised by the petitioner and I ruled that an election court is vested with the power to strike out or otherwise disposed of an election petition by way of a striking out application or a preliminary objection. My reasons are as follows.

**[15]** Election petitions are public interest cases and as such it is very much in the interest of the public that the matter should be speedily determined (see: *Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed* [1978] 1 LNS 245).

**[16]** The point as to whether an election judge has the jurisdiction to strike out an election petition that is defective without the need to go through the process of a full hearing has been settled by the Federal Courts in the cases of *Gan Joon Zin v. Fong Kui Lin & Anor* [2004] 4 CLJ 729, *Wan Sagar Wan Embong v. Harun Taib* [2008] 5 CLJ 14 and *Ahmad Jamaluddin Abd Majid v. Rafidah Aziz & Ors* [2009] 2 CLJ 785.

**[17]** Furthermore, election court has jurisdiction to make a determination on whether the candidate whose election is complained of was duly elected, as provided by s. 36 of the Act, after dealing with the election petition by way of preliminary objection (see: *Wan Sagar Wan Embong v. Harun Taib*.)

**[18]** Therefore, in my view the preliminary issue raised by the petitioner to the effect that an election judge does not have jurisdiction to strike out an election petition is without merit.

**[19]** This brings me to the 1st respondent's motion and the 2nd and 3rd respondents' preliminary objection to strike out the election petition.

**Non-compliance Of r. 15(1)(a) & (c), EPR**

**[20]** The issue that comes first for determination is the contention of the 1st respondent that the petitioner has purportedly served pursuant to r. 15(1)(a) of the EPR by personally serving on the 1st respondent on 3 June 2010 a purported "Notis Penyampaian Petisyen Pilihanraya (Menurut k. 15 Kaedah-kaedah Petisyen Pilihanraya 1954)" dated 24 May 2010 and a sealed copy of the

election petition (see: exh. K1). The contention is that the said notice under r. 15(1)(a) is defective in that it states at the last paragraph therein that the said notice is also posted on the notice board of the High Court by way of service on the 1st respondent. This contention is not free from difficulties.

**[21]** It must be noted that the EPR is not entirely clear as to whether the service must be done by one mode of service only. The petitioner is therefore entitled to use one or more modes provided under the EPR to effect service on the 1st respondent (see *Mohd Ridza Zain v. Hanafi Mamat & Ors* [2006] 1 LNS 194).

**[22]** Having carefully read the affidavits of service of Jaili bin Ahmad affirmed on 3 June 2010 and on 9 June 2010, there can be no doubt whatsoever that the petition and the r. 15(1)(a) notice were served on the respondents pursuant to r. 15(1)(a) EPR on the 1st respondent on 3 June 2010. The receipt of the papers was duly acknowledged by the 1st respondent. In addition, the petitioner also effected service of the petition and the r. 15(1)(c) notice on the 1st respondent by posting the papers on the notice board of the High Court of Shah Alam on 27 May 2010; advertising the r. 15(1)(c) notice in the National newspaper, Utusan Malaysia on 7 June 2010; and advertising the r. 15(1)(c) notice in the National newspaper, The Star on 8 June 2010. To that extent, I would therefore agree with the submission of learned counsel for the petitioner that two different types of notices were issued as both the methods under r. 15(1)(a) & (c) were adopted, hence, two different types of notices.

**[23]** Now, it is true that the notice in question (exh. K1) states therein "Notis ini juga telah ditampalkan di papan notis, Mahkamah Tinggi Shah Alam, sebagai Penyampaian kepada anda". In my view, there is no reason for any confusion or ambiguity as the notice uses the word "JUGA" in the last paragraph of the notice indicating that the service was also done pursuant to r. 15(1)(c) EPR. I am unable to accept the submission of Mr. Firoz Hussein, learned counsel for the 1st respondent to the effect that by so inserting the paragraph in the notice (exh. K1) it would suggest that the petitioner is opting for service by way of r. 15(1)(c). I reject the argument that the personal service of the petition on the 1st respondent is only for his information and does not operate as service under r. 15(1)(a). I also do not see, as argued by learned counsel for the petitioner, how the notice (exh. K1), makes it ambiguous on the mode of intended

service on the 1st respondent where it has caused confusion to the 1st respondent on the mode of service the petitioner seeks to rely upon. I do not see how has the 1st respondent has been prejudiced.

**[24]** On the facts as disclosed by the affidavits of service, there can be no doubt that the service of the relevant papers was effected on the 1st respondent by way of:

a. personal service pursuant to r. 15(1)(a) EPR; and

b. by posting the petition on the notice board of the High Court of Shah Alam and the national news papers pursuant to r. 15(1)(c) EPR.

**[25]** As to the 1st respondent's argument that the phrase "free of charge" was omitted from the paragraph in the notice of presentation of petition, I find that there is no merit in this argument. I find it hard to think that this omission has prejudiced the 1st respondent.

**[26]** On this issue, I conclude by saying that the service of the petition and the notices of presentation of the election petition has fully complied with r. 15(1) of the EPR.

**Non-compliance Of r. 9 Of The EPR**

**[27]** I turn next to the contention by the 1st respondent to the effect that there has been non compliance of r. 9 of the EPR. The 1st respondent's complaint on this point is that the notice of appointment of advocate is not stamped as required under r. 9.

**[28]** In the first place, the Stamp Act 1949 does not contain any provision for the stamping of documents of this nature. In any event, even if the said notice is not stamped as argued by the 1st respondent, it merely goes to the issue of admissibility of the notice and does not form a ground sufficient for this court to strike out the petition (see: *Chiew Chiu Sing v. Dato Seri Tiong King Sing* [2004] 8 CLJ 82 and *Ruhimin Adzim @ Ruhimin Ajim v. Bernard Dompok & Anor* [2004] 1 LNS 461).

**[29]** Hence, on this issue, I cannot accept learned counsel for the 1st respondent's argument that there was non-compliance with r. 9 of the EPR.

**[30]** So much about the technical issues pertaining to rr. 15 and 9 of the EPR.

## Non-compliance Of rr. 4(1)(b) And 4(4), (3) EPR

**[31]** That leaves me to deal with the question of non compliance of rr. 4(1)(b) & 4(4)(3) of the EPR. This is an important and crucial question into which I must look more closely. With regard to this issue, in essence, it is the contention of learned counsel for the 1st respondent and the learned Senior Federal Counsel (SFC) that the petition does not contain the material facts as required by rr. 4(1)(b) and 4(4)(3) in that the petitioner has failed to name the persons to whom the alleged corrupt acts were made or addressed. On this ground alone, they argued that the election petition should be struck out.

**[32]** In *Mohd Nazri Haji Din v. Dato' Seri Raja Ahmad Zainuddin bin Raja Haji Omar & Ors* [2009] 3 CLJ 221, the Federal Court held:

> It is therefore abundantly clear that the facts to be pleaded pursuant to r. 4(1) (b) and r. 4(4) (3) must be such as to make out a case for the petitioner. In other words all the material facts must be pleaded though a concise statement of them will suffice.
>
> Failure to comply with this mandatory requirement will render the petition defective. (emphasis added)

**[33]** It is at this stage that I pause here for a moment to underline the significance of the mandatory requirement. It may seem at first sight a hard result for any petitioner in any election petition. Why is this? The first thing that one should know and clearly understand is that the jurisdiction of the election judge to hear election petition is a creature of statute and the judge is especially bound strictly within the letters of the election laws (see: *Mahari Endut v. Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors* [2009] 4 CLJ 488). In the same vein, just as the election court is bound by the election laws, so too the petitioner in any election petition must strictly adhered to and obeyed all the requirements of the election laws. And in this regard, even in the area of Public Law litigation, the *audi alteram partem* rule, or the rule requiring fair hearing is of central importance. A basic norm of natural justice is that before initiating adjudicatory proceedings, the party concerned should be given notice of the case against him so as to enable him

to adequately defend himself. The right to a hearing becomes illusory if the party has no sufficient and full knowledge of the precise allegations which he has to meet. Notice is thus regarded as the *sine qua non* of the right of hearing (see: *Administrative Law of Malaysia and Singapore* 3rd edn by Professor MP Jain at p. 291). Over and above this, there is a greater reason for taking the same view in regard to matters pertaining to the allegations of corrupt practice in an election petition.

Such serious allegations are in the nature of quasi-criminal charges and must be proved beyond reasonable doubt and not on preponderance of probabilities (see: *Kho Whai Phiaw v. Chong Chieng Jen* [2009] 3 CLJ 201). It is for these reasons that election court insists upon a strict compliance of the election laws in order for the respondent to know the nature of the allegations so as to enable him to prepare his case. In this way, he might marshal his facts and preserve his evidence in anticipation of a judicial hearing (see: *Wan Daud bin Wan Jusoh v. Mohamed bin Hj Ali & Ors* [1988] 2 MLJ 384).

**[34]** Coming now to the present election petition, at this juncture, it is important to emphasize that the first ground is based on the allegation of corrupt practice committed by the 1st respondent and/or the agent pursuant to s. 32(c) of the Act. Section 32(c) states the election of a candidate at any election shall be declared to be void on an election petition on the ground that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate.

**[35]** In so far as it is relevant to the present petition, if one turns from the authorities and looks at the matter as a question of principle, I think the following principle of law was well settled by the decision of the Federal Court in *Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors* [2009] 3 CLJ 221 sustain an election petition under s. 32(a) and (c) of the Act, the material facts to be pleaded as required by r. 4 of EPR would be the elements that constitute the offence of bribery in question. Undoubtedly, the judgment of the Federal Court in *Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors* [2009] 3 CLJ 221 represents the law on this subject as we apply today. There is no other case that is clearer than this on this point. By

parity of reasoning, it cannot be emphasized enough that this requirement is a condition precedent and mandatory to abide by. It is with this principle in mind that I now turn to consider whether the mandatory requirements of r. 4 of the EPR have been complied with by the petitioner.

**[36]** First, it is very important to take a closer look at the provisions under current discussion, which are ss. 10(a), (c) and (e) of the Act.

**[37]** A plain reading of these three provisions would reveal that the gravamen of the offence of bribery within the meaning of the above penal provisions is inducing or influencing any person, by wrong means, to do or not to do a thing which he may otherwise have not done or done. In the context of the present petition, broadly speaking, the 1st respondent and/or his agent is alleged to have induced or influenced persons with a view to change their votes or influence the result of the by-election. It has to be said at this point that in order to constitute the offence of bribery within the meaning of ss. 10(a), (c) and (e) of the Act, a close and direct nexus must be proved between the bribery act and the person to whom it was made or addressed to do or not to do a thing which he otherwise have not done or done. These two things are linked up. Construed in this way and by reference to the facts and circumstances of the present case, I think the 1st respondent is entitled to know with clearness and certainty at the very earliest stage the name and identity of the persons to whom the alleged act was made or addressed (see: *Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors* [2009] 3 CLJ 221 and *Re Pengkalan Kota Bye-Election Teoh Teik Huat v. Lim Kean Siew & Anor* [1981] 1 LNS 1).

**[38]** The following question then arises: how is this mandatory requirement pleaded in the election petition at hand? Mr Malik Imtiaz, learned counsel for the petitioner argued to the effect that the details to the specific allegations of corrupt practice allegedly committed by the 1st respondent and/or his agent contained in the election petition have fully complied with the requirements of rr. 4(1)(b) & 4(4)(3) of the EPR. He argued that the petitioner has in the petition stated the locations, the venues and the speeches for the court to take into consideration. It is his contention that in election petition there was no necessity to reproduce the entire

speeches in the petition itself. He argued that the particulars alluded in the petition are more than sufficient for the 1st respondent to meet his case at trial. Learned counsel then brought to my attention the judgment of the Supreme Court of India in the case of *K.K. Ramachandran Master v. M.V. Sreyamakumar & Ors* [2010] STPL (Web) 444 SC to support his contention that the averments in the election petition has set out the material facts and give sufficient particulars that would justify the grant of an opportunity to the petitioner to prove his allegations at trial against the 1st respondent and/or his agent. To end his submission, Mr Malik Imtiaz said that the petition filed by the petitioner may not be a perfect petition but it is enough to give reason for this court to order for a trial.

**[39]** I have read thoroughly and gave my utmost consideration of the judgment of the Supreme Court of India in the case of *K.K. Ramachandran Master v. M.V. Sreyamakumar & Ors* to point the difference of that case from the present case. I respectfully decline to follow the Supreme Court of India case in light of our own EPR. But most important of all, I am bound to follow our Federal Court case in *Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors*.

**[40]** Coming back, then, to the present case, in vain, have I searched through the election petition and, particularly through paras 20 to 69 thereof, for any specific name of or identity of the persons to whom the alleged bribery act of the petitioner was made or addressed. The point to make here is this. It is true that the election petition contains various facts in relation to the alleged corrupt practices. Tellingly, however, on the basic and critical issue, the election petition is singularly silent of any specific name. It follows that, there is a glaring omission to mention the names of the persons said to have been so induced or influenced by the alleged act of the 1st respondent or his agent. What stands out also is that not one of the recipients of any such alleged bribe has been named in the petition. That is why, in this regard, I find the arguments of Mr Firoz Hussein and learned SFC argument very persuasive and the cases cited by them have given much assistance to this court in dealing directly with the issue. I need not go through all the cases here. But, I would say further that the identity of these persons in the election petition is ambiguous because it is stated generally to have been, "parliamentary electors".

This can imply or signify that the petitioner himself did not know at the time of filing this election petition the identity of the persons. As I see it, this kind of statement is quite vague and devoid of material facts, hence, it will render the petition defective. But I also need to consider one further argument. In this regard, Mr Azhar Azizan Harun argued, as I understand him, that the identity of the persons to whom the corrupt act was made or addressed is a matter of evidence which need not be pleaded. He then brought to my attention r. 5 of the EPR which says that evidence need not be stated in the petition, but the judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial upon such terms as to costs and otherwise as may be ordered. In countering this argument, Mr Firoz Hussein pointed out, I think, quite rightly that r. 5 becomes relevant only when the petitioner has fully complied with rr. 4(1) (b) and 4(4) of the EPR. I think there is substance in this argument. Indeed, to my mind, if an election petitioner failed to meet the mandatory requirements of r. 4 of EPR, it will be unfair and unreasonable if the onus is shifted on the respondent to make the application for such particulars. In my view, the name of the person to whom it was made or addressed is a material fact which must be pleaded under rr. 4(1) (b) and 4(4) of the EPR. It is not a matter of evidence. The 1st respondent must be informed of the precise identity of these persons before he can apply in writing for such particulars to this election court. This is how r. 5 operates. For this reason, I find myself quite unable to agree with the submission of Mr Azhar Azizan Harun to the effect that r. 5 of the EPR can save the petitioner's petition. It is an established principle of law that no evidence can be led on a plea not raised in pleadings and that no amount of evidence can cure a defect in the pleadings (see: *Azhar Hussain v. Rajiv Gandhi* AIR [1986] SC 1253).

**[41]** All that said, in my view, the fundamental flaw in the petition is a matter of substance and not merely form. This is not a mere technical non-compliance. The election petition in its present form is lacking in the most vital and material essential fact to furnish a cause of action. The result is that the petitioner has failed to plead the essential element that constitute the offences of bribery within the meaning of s. 10(a), (c) and (e) of the Act. Consequently, I hold that the petitioner has not complied with the

requirements of rr. 4(1)(b) and r. (4)(3) of the Act as the facts pleaded are insufficient to sustain the prayer. It renders the petition defective and invalid.

**[42]** But even having said this fatal flaw, the petitioner has also failed to provide the precise accusation of the bribery act committed by the 1st respondent and/or his agent. Take now the very 1st charge in the petition as an example. By virtue of s. 10(a), the following are the separate and distinct bribery acts contemplated by the legislature: (a) Gives, lend, agrees to lend; (b) Offers, promises; (c) Promise to procure; and (d) Endeavour to procure. Those provisions seek to deal with an extensive and a range of types of corrupt acts. Now, the election petition constitutes the charges levelled by the petitioner at the 1st respondent and/or his agent. If the charges are framed in such a manner that the specific and necessary ingredient of the offence is not clearly brought out in the charges, this becomes vague and defective. This is not to say that petitioner is required to file a perfect election petition. The charge must be a document setting out the specific accusation made against a person who is entitled to know its nature at the very early stage (see: Justice Dr Hamid Sultan bin Abu Backer in his book *Janab's Key to Criminal Procedure Evidence Advocacy And Professional Ethics,* 1st edn 2001, p 75). In *Kesha Prasad v. AD Mani* [1961] DEC 133 (MPHC), the High Court of Madhya Pradesh cited the case of *Bhikaji Keshao Joshi v. Brijlal Nandlal Biyani*, where the Supreme Court of India observed that the requirement of full particulars is one that has got to be complied with sufficient fullness and clarification so as to enable the opposite party fairly to meet them and they must be such as not to turn the enquiry before the tribunal into a rambling and roving inquisition. It all comes back to this. Since the pleadings in relation to s. 32(c) of the Act concerns "corrupt practice" the requirements of pleadings are strict (see: *Wan Sagar Wan Embong v. Harun Taib (No 2)* [2009] 1 CLJ 457 and *Dr Shafie Abu Bakar v. Pegawai Pengurus Pilihanraya N26 Bangi & Ors* [2005] 5 CLJ 349).

**[43]** It is now appropriate to consider whether the above requirements have been complied with by the petitioner in respect of the 1st charge. It is apparent that in stating the corrupt conduct of the 1st respondent, the petitioner merely quotes the words of the section, without clearly identified the precise corrupt practice levelled at the 1st respondent. When one carefully looks at the election

petition, it is clear that the petitioner failed to state his accusation with clarity and precision. Reading the 1st charge for example, it simply says "agreed to give, offered, promised, promised to procure, endeavoured to procure". What does this mean exactly? Looking at this ingredient of the charge, in many ways one will have to speculate or guess as to what exactly the corrupt act is being alleged against the 1st respondent and his agent. In doing so, and bearing in mind the separate and distinct corrupt acts contemplated by s. 10(a) of the Act, which I have pointed out earlier, the petitioner has failed to clearly identify the corrupt practice levelled at the 1st respondent. The reason for this insistence is obvious. This point has already been made earlier in the judgment but deserved to be reiterated here. The 1st respondent has the right to know at the earliest possible moment the exact charge which he is called upon to meet. In this way, the petitioner is required to state with precision such specific act which can be attributed to the 1st respondent to indicate his culpability. I should perhaps note that the manner the charge is crafted in the petition is akin to casting the net wide in the hope it might strike with either one. The rule does not allow this.

**[44]** And as if that is not flawed enough, there would be great difficulty in determining and defining what is the corrupt act said to have been committed by the 1st respondent and/or his agent when one remembers that the full text of what the 1st respondent's agent has said has not been set out (see: *Mohd Nazri bin Haji Din v. Dato' Seri Raja Ahmad Zainuddin bin Raja Haji Omar & Ors*). There is merit in the argument of Mr Firoz Hussein that the part left out could well have neutralized the part that has been pleaded.

**[45]** Bearing in mind that a close and direct nexus must be proved between the alleged bribery acts of the 1st respondent and/or his agent, and the persons to whom they were made or addressed to, it will be immediately noticed that all the other charges also suffer from similar kind of shortcomings. In this sense, the petition cannot be sustained in law as it lacks clarity and precision. The petitioner failed to plead the essential element that constitute the offences of bribery within the meaning of s. 10(a), (c) and (e) of the Act. Consequently, I hold that the petitioner has not complied with the requirements of r. 4(1)(b) and r. (4)(3) as the facts pleaded are insufficient to sustain the prayer. This in turn, renders the petition defective and invalid.

**[46]** So far I have dealt with the issues pertaining to r. 4 of the EPR in relation to the ground of the offence of bribery pursuant to s. 32(c) of the Act.

**[47]** From this point on, I shall deal with the ground of general bribery by the 1st respondent or his agent pursuant to s. 32(a) of the Act. Here, it is the contention of all the three respondents that the petitioner has also failed to comply with rr. 4(1) and 4(4)(3) of EPR in that he failed to plead how the purported "general bribery" (which is denied in toto by the respondents) has so extensively prevailed that it is reasonably supposed to have affected the result of the by-election.

**[48]** First and foremost, what is important to notice, however, is that the petitioner has relied entirely on his pleading of s. 32(c) to sustain his allegation of s. 32(a). I have already expressed my view that in relation to the ground of corrupt practice by the 1st respondent or his agent pursuant to s. 32(c) of the Act, the petitioner has failed to plead the essential element that constitute the offences of bribery within the meaning of s. 10(a), (c) and (e) of the Act and I have said that the petitioner has not complied with the requirements of r. 4(1) (b) and r. (4) (3) of the Act as the facts pleaded are insufficient to sustain the prayer. Consequently, since the petitioner has also relied entirely on his pleading of s. 32(c), the ground under s. 32(a) is therefore wholly untenable.

**[49]** Be that as it may, the statement of the poll after the addition of votes published in the Gazette P.U. (B) 237 dated 6 May 2010 shows that 24,997 votes were cast in favour of the 1st respondent and 23,272 votes were cast in favour of the petitioner; total number of electorate 64,500 and percentage of voting was 76%. Assuming general bribery has so extensively prevailed in the by-election, bearing in mind that the 1st respondent was returned and declared the winner with a significant majority of 1,725 votes, in my view, the petitioner has failed to state the facts and particulars to show in the election petition itself how the alleged general bribery has so extensively prevailed that it is reasonably supposed to have affected the result of the by-election (see: *Gan Joon Zin v. Fong Kui Lun & Ors* [2004] 4 CLJ 729). There are no particulars to show the number of voters who had voted for the 1st respondent and not for the petitioner as a result of the alleged general bribery so

extensively prevailed in the by-election. In my view, there is merit in the arguments of the learned SFC to the effect that no sufficient particulars have been furnished in the election petition to explain that the alleged extensive prevalence of general bribery is more probable than not have affected the result of the by election. To my mind, there is no fact sufficient to formulate a cause of action to legally sustain the prayers sought. Hence, in my judgment the petitioner has only made general statements and failed to comply with the provisions of s. 32(a) of the Act read with rr. 4(1)(b) and 4(4) (3) of the EPR for the purpose of enabling the petition to go to trial.

## Conclusion

**[50]** One final point remains. Both Mr Malik Imtiaz and Mr Azhar Azizan Harun said and said forcibly of how important the election petition should go to trial. In the course of their submissions, they drew attention to this court what were allegedly to have been said and done during the by-election campaign. They urged this court to put to trial all those corrupt practice allegations made by the petitioner in order for this court to protect the purity of elections. Now, I accept the proposition that the result of an election is subject to judicial scrutiny. Indeed, an election court has a constitutional responsibility to protect and safeguard the purity of elections. But what should happen when the material facts and particulars of the alleged corrupt practices are not succinctly furnished and the election petition is fundamentally defective? Thus, a line has to be drawn somewhere. Now, I can see no reason whatsoever in principle why an election petition should not go to trial. The only exception in this regard is when the petition is fundamentally defective, in which case the petition should not go to trial. I have already expressed my view that the election petition is fundamentally defective. Is it then in accordance with the concept of procedural fairness for the 1st respondent to answer defective charges? I think not. I think I should be wrong if I were to hold otherwise. Leaving aside the question that the petitioner is required to plead such material particulars in the election petition pursuant to the EPR, as discussed earlier, I take the view that it is a basic principle of natural justice that the 1st respondent should be given a complete notice of the case against him to adequately defend himself and to have a fair opportunity of answering the same. With all respect to Mr Malik Imtiaz and Mr Azhar Azizan Harun, their

arguments do not overcome, to my mind, this point of profound difficulty in the face of the defective petition; the fundamental defect being of a fatal nature. I do not think, it is enough to say that as a matter of policy and because this election petition has somewhat generated and attracted a lot of public interest, it should then be put to trial. In the end, applying the election laws as I understand it to be, on the whole, I am not entirely satisfied that this election petition, as it now stands, falls on the side of the line as to justify the charges to be put to trial. Therefore, to sum it up, based on all the previous mentioned reasons, I see no alternative but to find that the grounds raised by of the 1st respondent's motion (encl. 26) and the 2nd and 3rd respondents' preliminary objection relating to rr. 4(1)(b) and 4(4)(3) EPR are sufficient to strike out the petition with costs.

**[51]** In accordance with s. 36(1) of the Act, I declare that the 1st respondent was duly elected as the Member of Parliament for Hulu Selangor Parliamentary Constituency of P94, and shall certify this decision to the Election Commission in due course.